



Adam & 3 others v Kwale District Land Registrar & 2 others (Environment & Land Case E027 of 2023) [2024] KEELC 3863 (KLR) (17 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3863 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E027 OF 2023**

AE DENA, J

MAY 17, 2024

BETWEEN

**MOHAMMED ADAM 1ST PLAINTIFF
DR AMIN ALI SHEIKHI 2ND PLAINTIFF
JAMILLAH SALIM 3RD PLAINTIFF
DR MOHAMMUD S SAID 4TH PLAINTIFF**

AND

**KWALE DISTRICT LAND REGISTRAR 1ST DEFENDANT
CHIEF LAND REGISTRAR 2ND DEFENDANT
ALI ATHUMANI MWACHOTEA 3RD DEFENDANT**

RULING

1. The application subject of this ruling has been brought pursuant to the provisions of Order 40 Rule 1[a] and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A,1B and 3A of the [Civil Procedure Act](#) and Article 35 of [the Constitution](#) seeking the following orders; -
 1. Spent
 2. Pending inter parties hearing and determination of this application and hearing and determination of the main suit, the court be pleased to issue an injunction restraining the 3rd Defendant/Respondent whether by himself, his agents and servants from constructing, erecting structures, digging, transferring, selling, interfering, alienating, disposing, entering into, remaining on or otherwise dealing with all that parcel of land known as LR No. Kwale/Diani/524, Kwale/Diani/525, Kwale/Diani/526 and Kwale/Diani/527.



3. Pending inter parties hearing and determination of this application and hearing and determination of the main suit, the court be pleased to issue an injunction restraining the 1st and 2nd Defendant/Respondents whether by himself, his agents and servants from reconstructing, the land registers on account of Gazette Notice dated 24/2/2023 and or otherwise dealing with all that parcel of land known as LR No Kwale/Diani/524, Kwale/Diani/525, Kwale/Diani/526 and Kwale/Diani/527.
 4. Mandatory injunction compelling the 1st and 2nd Defendants to produce to the court all the documents including the parcel file, consents, receipts, valuations, register, transfer and any other documents used by the 1st and 2nd Defendants to issue the documents purporting to be title deeds in the name of the 3rd Defendant
 5. Costs.
2. The application is premised on the grounds listed on the face of the application and the supporting affidavits sworn by Mohammed Adam, Dr. Amin Ali Sheikh and Dr. Muhammad S Said. In the affidavit sworn by the 1st Plaintiff/Applicant, it is averred that he is the registered owner of parcels No. Kwale/Diani/526 and Kwale/Diani/527 as per the attached title deeds. The deponent stated that he acquired the said parcels at valuable consideration together with parcel No. Kwale/Diani/524 and Kwale/Diani/525 which he had transferred to the 2nd, 3rd and 4th Defendants for valuable consideration and title deeds subsequently issued to them. The 1st Plaintiff denies having ever transferred parcel No. Kwale/Diani/526 and 527 to the 3rd Defendant or to any other person and states that the Defendants are colluding to fraudulently transfer his properties and those of his Co-Plaintiffs to the 3rd Defendant vide gazette notices dated 24/2/2023. The said transfers are further stated to be vide a reconstruction of the register of which the 1st Plaintiff has no knowledge or consent to. The 1st Plaintiff seeks for the orders herein to enforce and protect his rights over the suit properties.
3. The 1st Applicant's averments are reiterated in the affidavit in support of the application also sworn by Dr. Amin Ali Sheikh. He reiterates that together with the 3rd Plaintiff they are the registered owners of the suit property Kwale/Diani/524. That since acquisition of the same from the 1st Plaintiff, they have been paying land rates and have never transferred the property to the 3rd Defendant or any other person. The attempt by the 3rd Defendant to have the property registered in his names pursuant to a gazette notice over a lost green card is termed as fraudulent and hence the instant application. These averments are similarly reiterated by Dr. Muhammad S Said in the affidavit also sworn in support of the application.

Response

4. In response to the application, the 1st and 2nd Defendants filed grounds of opposition on 11/6/2023 as hereunder:-
 1. The application is misconceived, frivolous, vexatious and an abuse of the court process.
 2. Prayer 4 of the application is misconceived and misplaced and ought not be granted by this court.
 3. The Applicants have not demonstrated that there are compelling reasons for a mandatory injunction to be issued against the 1st and 2nd Defendants/Respondents.



4. The Applicants have not established a clear and summary case to warrant the issuance of a mandatory injunction as was held by the court in *Godfrey Otieno Onyango [Suing on Behalf of Ronald Onyango & 2 Others V Crispin Odour Obudo & 8 Others [2014] eKLR.*
 5. The Applicants have not demonstrated there are special circumstances which warrant the issuance of a mandatory injunction as was held by the Court of Appeal in *Kenya Breweries Ltd & 2 Others V Washington Okeyo [2002] eKLR*
 6. That it is in the interest of justice that this application be dismissed with costs to the 1st and 2nd Respondents.
- 5 By orders of the court issued on 3/8/2023 the 3rd Respondent was served by way of substituted service by an advertisement placed in the daily Nation on 7/9/2023 as evidenced by the affidavit of service sworn by Judith Muisyo Advocate. Despite the said service the 3rd Respondent has not filed any response to the application and suit.
- 6 The application was dispensed by way of written submissions. The 1st and 2nd Defendants complied on 11th January 2024 and Plaintiffs applicants on 16th January 2024. The court has considered the submissions.

Determination

7. The backdrop on which a temporary injunction is to be granted is provided in Order 40 Rule 1 of the Civil Procedure Rules, 2010. From the said provisions, the purpose of such orders is to prevent and/or stay the wasting or disposition of the suit property. The principles guiding the court in deciding whether or not to grant an interlocutory injunction are well settled in the case of *Giella – Versus - Cassman Brown* as follows: -
 - a. Prima facie case with a probability of success;
 - b. The applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages; and
 - c. If the court is in doubt on the existence or otherwise of a prima facie case, it will decide the application on the balance of convenience.
8. On whether the Applicants have established a prima facie case, the term Prima facie case was defined by the Court of Appeal in *Mrao Limited – Versus - First American Bank of Kenya Limited & 2 others (2003) eKLR.*

So, what is “a prima facie case” I would say that in civil cases it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.
9. It is the Plaintiff’s case that they are the registered owners of the suit properties herein as evidenced by copies of the title deeds to the respective properties. From the record there is no evidence presented by the respondents in a rebuttal of the assertion that the suit properties are registered in the names of the Plaintiffs. As has been stated in several authorities, a title deed is prima facie evidence of ownership of land. This is reinforced in statute under Section 24 and 25 of the *Land Registration Act* No 3 of 2012. It is therefore this court’s finding that the Applicant has established a prima facie case.
10. The 1st Plaintiff at paragraph 11 of his affidavit in support of the application stated that he had on several occasions requested for the parcels file and all documents relating to the suit parcel. That to



his dismay the same have never been availed. This court notes that the circumstances under which the Gazette Notice ordering reconstruction of the register has not been properly explained. Nonetheless these are issues to be interrogated at the full hearing when parties will cement both their claims with evidence.

11. The second issue is whether the Plaintiffs have demonstrated that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury thus;

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury”.

12. From the above definition, it is rather obvious that being the registered owners to the suit properties, any adverse orders as against the said ownership will lead to irreparable loss and damages. the second limb is satisfied based on this. The balance of convenience automatically tilts towards the applicants. I refer to the case of Paul Gitonga Wanjau Vs Gathuthis Tea Factory Company Ltd & 2 others (2016) eKLR, where the court dealing with the issue of balance of convenience expressed itself thus:

Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

13. It is noteworthy that the 1st and 2nd Respondents have stated in their submissions that that their main contest is with the orders for mandatory injunction being made at interlocutory stage. It is submitted that the said prayer No. 4 is final in nature. That the applicants have not demonstrated existence of any special circumstances that would warrant such orders at interlocutory stage. That cases of land ownership are not straight forward and the court should only make a decision after full trial. Moreover the documents sought can be accessed through pre-trial motions and or by order of court the Land Registrar can be summoned to produce the same.

14. The Court of Appeal while discussing the issue of grant of mandatory injunctions at an interlocutory stage reaffirmed its decision in Kenya Breweries Limited & another Vs Washington O. Okeyo [2002] eKLR Joseph Kaloki t/a Royal Family Assembly Vs Nancy Atieno Ouma [2020] eKLR and stated that: -

A mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that



if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application”.

15. The order sought is a mandatory injunction to compel the Kwale District Land Registrar and the Chief Land Registrar being the 1st and 2nd Defendants respectively to produce the parcel file, consents, receipts, valuations, register, transfer and any other documents used by them to issue the documents purporting to be title deeds in the name of the 3rd Defendant.
16. I think it is important to understand the reason why the Applicant seeks the above orders. My understanding is that there is apprehension that the Defendants will transfer the suit properties using forged documents before the hearing of this suit making it difficult for the court to reverse the transactions. How does this order assist the Plaintiff in preempting the subsequent transactions? For me I do not see any justifiable cause for the said mandatory orders to be issued at this stage. The best order would be to protect the register of the suit property and ensure no entries are registered including the proposed reconstruction. The Land Registrar is a party to these proceedings and I agree with the Defendant that the documentation can be addressed during the pretrial protocols. I decline to grant this order.
17. The upshot of the foregoing is that the following orders shall issue to dispose of the application dated 24/4/24
 - i. Pending hearing and determination of the main suit, an order of injunction hereby issues restraining the 3rd Defendant/Respondent whether by himself, his agents and servants from constructing, erecting structures, digging, transferring, selling, alienating, disposing, dealing with all that parcel of land known as LR No Kwale/Diani/524, Kwale/Diani/525, Kwale/Diani/526 and Kwale/Diani/527.
 - ii. Pending hearing and determination of the main suit, an order of injunction hereby issues restraining the 1st and 2nd Defendant/Respondents whether by himself, his agents and servants from reconstructing, the land registers on account of Gazette Notice dated 24/2/2023 and or otherwise dealing with all that parcel of land known as LR No Kwale/Diani/524, Kwale/Diani/525, Kwale/Diani/526 and Kwale/Diani/527.
 - iii. The order for mandatory injunction is declined.
 - iv. Costs shall be in the cause.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED THIS 17TH DAY OF MAY 2024.

A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Kagu holding brief for Ms. Muisyo for the Plaintiff

Penda holding brief for Ms. Rukiya for the 1st & 2nd Defendants

Mr. Daniel Disii - Court Assistant

